May 26, 2011

The Wrongful Conviction as Way of Life

By JEFFREY ROSEN

CONVICTING THE INNOCENT

Where Criminal Prosecutions Go Wrong

By Brandon L. Garrett

367 pp. Harvard University Press. $39.95

Judge Learned Hand called “the ghost of the innocent man convicted” an “unreal dream.” But in “Convicting the Innocent,” Brandon L. Garrett shows that it can be a “nightmarish reality.”

Since the late 1980s, DNA testing has exonerated more than 250 wrongly convicted people, who spent an average of 13 years in prison for crimes they didn’t commit. (There is every reason to think that more people have been wrongly convicted since then, but only these 250 have been definitively exonerated by postconviction DNA tests.) Seventeen of the 250 were sentenced to die, and 80 to spend the rest of their lives in prison. By poring over trial transcripts and interviewing lawyers, prosecutors and court reporters, Garrett, a law professor at the University of Virginia School of Law, seeks to explore who these 250 innocent people are, and why they were wrongly convicted.

His alarming conclusion: the wrongful convictions were not idiosyncratic but resulted from a series of flawed practices that the courts rely on every day, namely, false and coerced confessions, questionable eyewitness procedures, invalid forensic testimony and corrupt statements by jailhouse informers. Garrett’s book is a gripping contribution to the literature of injustice, along with a galvanizing call for reform.

Almost 90 percent of the 250 innocent people later exonerated were falsely convicted of rape, or rape and murder, and 40 of them actually confessed to crimes they didn’t commit, most adding specific details that only the real culprit could have known. How did this happen?

Garrett describes how the police, intentionally or not, fed details of the crime to the suspects — and then recorded only portions of the interrogations so that it was difficult for defense lawyers and jurors to reconstruct the truth. Even the selectively recorded interrogations make for painful reading, as the suspects offer facts that are inconsistent with what happened, and the police browbeat them into false confessions. (Detective: “You hung her!” Vasquez: “O.K., so I hung her.”) Unfortunately, the Supreme Court has refused to focus on whether confessions are reliable, asking instead whether they were coerced, or offered without Miranda warnings.

Garrett says the best protection against false confessions would be to require that police record interrogations from beginning to end; at the moment, 11 states and the District of Columbia are required or encouraged to record at least some interrogations.

In addition to false confessions, eyewitnesses wrongly identified the accused in 76 percent of the 250 cases. The unreliability of witness identifications is now widely known, but Garrett was surprised to discover how flagrantly unreliable the procedures were in the cases he examined. In 78 percent of the trials, he found evidence that the police contaminated the eyewitness identifications with suggestive methods, like indicating which suspect in a lineup should be selected, or conducting lineups where one suspect obviously stood out from the others. (Many of the convicted looked nothing like the initial description given by the victims.) Garrett learned that while the witnesses were confident by the time of the trial that they had identified the right suspect, in more than half the cases they had not been confident at the time of the initial identification.

Of those exonerated by DNA, 70 percent were from minorities, and in nearly half of the rape cases involving blacks or Hispanics, the victims were white. (Garrett points out that "most sexual offenses, almost 90 percent, are committed by offenders of the same race as the victim.") Garrett criticizes the Supreme Court for allowing lineups that were unfairly conducted, and says the best way to avoid erroneous identifications is to use a double-blind procedure where police officers can't influence the witness because they don't know which person in the lineup is the suspect.

Garrett found invalid forensic testimony in 61 percent of the trials where an analyst testified for the prosecution, including overly confident claims of matching bite marks, shoe prints and hair samples. (One leading geneticist noted in 1989 that clinical and forensic labs have to meet higher standards to diagnose strep throat than to put a defendant on death row.) And Garrett discovered unreliable testimony by jailhouse informers in 21 percent of the trials — informers who, in exchange for lenient treatment from prosecutors, lied about hearing specific details of the crime from their cell mates. Garrett suggests this testimony could be avoided if prosecutors were prohibited from promising informers secret deals that weren't disclosed to the defense.

Garrett's statistical analysis is invaluable, but the most dramatic parts of his book are those that provide narrative details of trials that failed to prevent the innocent from being wrongly convicted. It turns out to be surprisingly hard to prove your innocence: most people don't remember where they were on a particular day months ago, and can present only weak alibis.

Especially memorable are the dignity and self-control with which those convicted asserted their innocence and recanted their false confessions.

Even when facing the death penalty at their sentencing hearings, these innocent people often maintained a remarkable degree of poise. After the verdicts were read, some of them understandably lashed out in anger and then sought to compose themselves. In the Central Park jogger case, one of the convicted was taken out of the courtroom after he exclaimed: "No. No. No. Can't take this. O, Lord. Jesus. No. . . . It's wrong. It's wrong. No. No."

Where were the courts in all of these 250 miscarriages of justice? In 10 percent of the cases, appellate courts called the evidence of the innocent people's guilt "overwhelming," while the Supreme Court summarily dismissed requests to review 37 of the cases without giving reasons. I teach criminal procedure, and after reading Garrett's book, I am looking forward to future discussions with students of the many Supreme Court cases that narrowly concentrate on procedural regularity, rather than encourage appellate courts to review the accuracy of evidence.

Garrett makes a powerful argument for enhanced access to DNA testing: in addition to clearing the innocent, DNA tests in 45 percent of the cases he studied identified the actual rapists or murderers, many of whom had been free for more than a decade to commit other crimes. And he insists that by placing too much reliance on decisions made early in the investigative process, we place the innocent at an unnecessarily high risk of being convicted of crimes they didn't commit. Garrett ends by reviewing the most promising bipartisan reforms that seek to increase the accuracy and reliability of criminal convictions, like North Carolina's Actual Innocence

Commission, which has required the recording of homicide interrogations, expanded the procedures for preserving evidence and increased defendants' access to DNA testing. But it's the stories in his book that stick in the memory. One can only hope that they will mobilize a broad range of citizens, liberal and conservative, to demand legislative and judicial reforms ensuring

that the innocent go free whether or not the constable has blundered. “What makes the trials of exonerees so frightening is that they show how the case against an innocent person may not seem weak,” Garrett writes. “The case may seem uncannily strong.”

Jeffrey Rosen is a law professor at George Washington University and the legal affairs editor of The New Republic.